No. 43557-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Todd Phelps,**

Appellant.

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Lewis County Superior Court Cause No. 11-1-00790-6

The Honorable Judge Nelson E. Hunt

# Appellant's Reply Brief

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## ARGUMENT

### I. THE TRIAL COURT VIOLATED THE CONSTITUTIONAL REQUIREMENT THAT CRIMINAL TRIALS BE OPEN AND PUBLIC.

A. The court unconstitutionally closed a portion of jury selection.

The obligation to hold criminal trials in public attaches to jury selection. U.S. Const. Amend. VI, U.S. Const. Amend. XIV; Wash. Const. art. I, §§10, 22; *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009); *State v. Wise*, 176 Wn.2d 1, 11, 288 P.3d 1113 (2012).

Unnecessary closure of a portion of jury selection requires automatic reversal. *Strode,* 167 Wn.2d at 231 (plurality); *Presley v. Georgia*, 558 U.S. 209, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010). Courts look to the plain language of the trial transcript to determine whether or not a closure occurred. *State v. Brightman*, 155 Wn.2d 506, 516, 122 P.3d 150 (2005).

In this case, jurors were questioned and excused behind closed doors. RP (4/17/12 voir dire) 2-128; CP 256-57. This came to light when Juror 62 mistakenly appeared for jury selection, even though he'd already been excused in a proceeding that took place outside the courtroom. RP (4/17/12 voir dire) 21-23. The court removed Juror 62 for reasons related to Mr. Phelps's case. RP (4/17/12 voir dire) 21-23. There may also have

been other prospective jurors excused outside the courtroom. *See* Appellant's Opening Brief, pp. 13-14 (noting that Juror 62's name was added to the list by hand when he showed up despite having been excused). In addition, the court's decision to excuse Juror 28 and Juror 48 did not occur on the record in open court. RP (4/17/12 voir dire) 5, 25, 106; *See* CP 256-57. This suggests that the court excused them behind closed doors as well.

Respondent argues that the court excused Juror 62 in open court. Brief of Respondent, pp. 19-20. But the in-court decision to excuse Juror 62 followed a prior out-of-court decision relieving him from serving for case-related reasons. RP (4/17/12 voir dire) 21-23. Respondent does not dispute this. Instead, Respondent claims—without citation to the record—that this occurred "at some unknown time prior to trial." Brief of Respondent, p. 20.

This argument lacks merit for three reasons. First, nothing in the record suggests that Juror 62 was excused prior to the start of trial. Second, by excusing Juror 62 for case-related reasons, the judge started the process of selecting the jury—even if this occurred before the scheduled start of jury selection. *See, e.g., State v. Irby,* 170 Wn.2d 874, 886, 246 P.3d 796 (2011) (holding that jury selection included email exchange that occurred before general questioning was scheduled to start,

for purpose of defendant's right to be present.) Third, there is no "prior to trial" exception to the requirement that criminal justice be administered openly and publicly. Indeed, the right attaches to certain pretrial proceedings. Respondent cites no contrary authority, suggesting none exists. *See Coluccio Constr. v. King County*, 136 Wn. App. 751, 779, 150 P.3d 1147 (2007).

Respondent also claims that the court "clearly" excused Juror 28 and Juror 48 during a sidebar. Brief of Respondent, p. 19. This is incorrect: the record does not "clearly" establish that the jurors were excused during a sidebar. The "plain language" of the transcript suggests that the court excused the jurors outside the courtroom. *Brightman*, 155 Wn.2d at 516. Accordingly, the state bears the burden of showing that no closure occurred. *Id.*

By dismissing jurors behind closed doors, the court violated the constitutional requirement that criminal trials be administered openly. U.S. Const. Amend. VI, U.S. Const. Amend. XIV; Wash. Const. art. I, §§10, 22; *State v. Bone-Club,* 128 Wn.2d 254, 259, 906 P.2d 325 (1995). Mr. Phelps's convictions must be reversed and the case remanded for a new trial. *State v. Paumier*, 176 Wn.2d 29, 288 P.3d 1126 (2012).

B. The court erroneously conducted proceedings behind closed doors.

Where closed proceedings are not transcribed, the state should bear the burden of establishing what transpired. *See* Appellant's Opening Brief, pp. 11-12. Respondent does not seek to avoid this burden. Brief of Respondent, pp. 12-24. The absence of argument on this point may be treated as a concession. *See In re Pullman,* 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009).

Instead, Respondent assumes that the trial judge made an adequate record of everything that took place in chambers. Brief of Respondent, pp. 21-24. This is incorrect. The trial judge made a record of some decisions that had been made in chambers, but did not explicitly state that nothing else occurred *in camera* and did not reveal how each decision was reached. The court may have resolved some issues after hearing argument; the record does not reveal the extent of any disputes between the parties. Absent a transcript of the *in camera* proceedings, the state cannot meet its burden of proving what happened behind closed doors.[1]

Respondent goes on to argue that "experience and logic" excuses the closed-door proceedings. Respondent's arguments under the test cannot resolve the issue because the record fails to establish what

[1] In some circumstances, a summary could prove sufficient, but only if the parties agree on the record that the summary is complete and accurate. The parties did not make an agreement of that sort here.

transpired *in camera.* Without a complete and accurate picture of the proceedings, the "experience and logic" test does not support Respondent's position.

If any of the in-chambers discussions involved disputed issues, the proceedings should have been open to the public. *See* Appellant's Opening Brief, pp. 14-17. Because Respondent fails to prove what happened in the judge's chambers, Mr. Phelps's conviction cannot stand. U.S. Const. Amend. VI, U.S. Const. Amend. XIV; Wash. Const. art. I, §§10, 22; *Bone-Club,* 128 Wn.2d at 259. Accordingly, his conviction must be reversed and the case remanded for a new trial. *Id.*

## II. THE TRIAL COURT VIOLATED MR. PHELPS'S RIGHT TO BE PRESENT BY EXCUSING JURORS IN MR. PHELPS'S ABSENCE.

Mr. Phelps rests on the argument set forth above and in Appellant's Opening Brief.

## III. RESPONDENT'S CONCESSION THAT THE INFORMATION OMITS LANGUAGE DESCRIBING AN ESSENTIAL ELEMENT REQUIRES DISMISSAL OF COUNT TWO WITHOUT PREJUDICE.

A charging document must inform the accused person of each element of the offense. U.S. Const. Amend. VI; XIV; Wash. Const. art. I, § 22; *State v. Johnson*, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992). This requirement applies even when the accused raises a challenge post-verdict. *State v. Kjorsvik*, 117 Wn.2d 93, 102-105, 812 P.2d 86 (1991). The

Information must include all essential elements, although a diminished standard for clarity applies for challenges made after conviction. *Id.,* at 105-106.

Conviction in count two required proof of sexual contact with a person who was not more than twenty-one. RCW 9A.44.096(1)(b).

Respondent concedes that the Information did not include language explaining this element. Brief of Respondent, p. 30. Respondent does not claim that the Information somehow communicated the element in an inartful fashion. Brief of Respondent, p. 30. Instead, Respondent contends that the allegation of A.A.'s date of birth sufficiently apprised Mr. Phelps of the element. Brief of Respondent, pp. 30-31. This is incorrect.

A.A.'s date of birth did not tell Mr. Phelps what the state was required to prove. Whether A.A. was 16, 18, 21, or 30 at the time of the alleged offense, her date of birth did nothing to inform Mr. Phelps of the element the state was required to establish to obtain a conviction. RCW 9A.44.096(1)(b). Accordingly, the Information did not charge a crime.

The defective Information requires reversal of the conviction. U.S. Const. Amend. VI; Wash. Const. art. I, § 22. *Kjorsvik,* 117 Wn.2d at 104-106. The charge must be dismissed without prejudice. *Id.*

## IV. RESPONDENT CONCEDES THAT THE COURT FAILED TO PROVIDE A UNANIMITY INSTRUCTION IN THIS MULTIPLE ACTS CASE.

The state constitution guarantees an accused person the right to a unanimous verdict. Wash. Const. art. I, §21; *State v. Elmore*, 155 Wn.2d 758, 771 n. 4, 123 P.3d 72 (2005). Even absent objection in the trial court, failure to provide a unanimity instruction must be considered on appeal "because of [the] constitutional implications" resulting from such failure. *State v. Fiallo-Lopez*, 78 Wn. App. 717, 725, 899 P.2d 1294 (1995); RAP 2.5(a)(3).[2] Where the circumstances require a unanimity instruction, a court's failure to give one *necessarily* creates manifest error affecting the accused person's constitutional right to a unanimous verdict.[3] *State v. Watkins*, 136 Wn. App. 240, 244-245, 148 P.3d 1112 (2006); *State v. Greathouse*, 113 Wn. App. 889, 916, 56 P.3d 569 (2002); *State v. Tang*, 75 Wn. App. 473, 478 n. 6, 878 P.2d 487 (1994) *on reconsideration,* 77 Wn. App. 644, 893 P.2d 646 (1995).

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[2] Courts have reviewed such errors for the first time on appeal even prior to the adoption of the Rules of Appellate Procedure. *See State v. Fitzgerald*, 39 Wn. App. 652, 655, 694 P.2d 1117 (1985); *State v. Green*, 94 Wn.2d 216, 231, 616 P.2d 628 (1980).

[3] Furthermore, "the test for determining whether an alleged error is 'manifest' is closely related to the test for the substantive issue of whether a [unanimity] instruction was required." *State v. Knutz*, 161 Wn. App. 395, 407, 253 P.3d 437 (2011). Thus a reviewing court may appropriately "conflate these two analyses and address [the] substantive argument" without first finding the error manifest. *Id.*

Respondent concedes that this case involves multiple acts, and that the court's failure to give a unanimity instruction raises a constitutional issue. Brief of Respondent, pp. 31-34, 35. Respondent contends that the prosecutor made an election, thus rendering a unanimity instruction unnecessary. Brief of Respondent, pp. 34-38.[4] According to Respondent, the prosecutor's closing argument reference to the April 2nd incident constituted an election, when combined with the charging date. Brief of Respondent, p. 35, 37. This is incorrect.

In a multiple acts case, juror unanimity is achieved only when all jurors agree that the state has proved a particular incident beyond a reasonable doubt. *State v. Coleman,* 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). Because of this, a prosecutor's election must have two components. First, the state must clearly communicate which incident it relies upon to prove the charged crime. Second, the prosecutor must indicate that none of the other incidents can provide the basis for conviction. This second component is more important than the first: if jurors don't know they are limited to the incident mentioned by the prosecutor, they will not know they must explicitly agree on that incident.

[4] Respondent claims this means the error does not qualify as "manifest." Brief of Respondent, pp. 34-38. In fact, however, Respondent addresses the merits of the issue, and does not suggest it cannot be reviewed.

Indeed, without both components of the election, jurors may not even discuss which incident forms the basis for their verdict. Absent a two-component election, a significant risk remains that a divided jury will render the verdict, with some jurors voting based on one incident and others voting based on another.

Even assuming the prosecutor's reference to the April 2nd incident sufficiently communicated the state's intent to rely upon that incident, nothing in the prosecutor's arguments or the court's instructions prohibited jurors from considering one of the other incidents. RP 1486-1553, 1580-1592; CP 281-300. In other words, the purported election was incomplete. Jurors who did not agree to convict based on the April 2nd incident were free to consider any of the other incidents. Nothing—not even the charging period—limited them to the April 2nd incident. *See, e.g., State v. Hayes*, 81 Wn. App. 425, 432, 914 P.2d 788 (1996) ("[W]here time is not a material element of the charged crime, the language 'on or about' is sufficient to admit proof of the act at any time within the statute of limitations, so long as there is no defense of alibi.") And nothing in the instructions (or the argument) made the unanimity requirement clear, so long as jurors agreed that the crime had been committed.

In the absence of a proper two-component election or a unanimity instruction, a divided jury might have voted to convict. Some jurors may

have believed Mr. Phelps had sexual contact with A.A. at his house, while others believed sexual contact occurred on the bus but not at the house. RP (04/19/2012) 474, 483, 487, 512-513, 519, 526, 528-530; RP (04/20/2012) 566.

Because Mr. Phelps may have been convicted by a jury divided in this manner, his conviction cannot stand. Count two must be reversed and the charge remanded for a new trial. *Coleman,* 159 Wn.2d at 511. Upon retrial, the state must elect a single act or the court must give a unanimity instruction. *Id.*

## V. THE PROSECUTOR COMMITTED MISCONDUCT THAT WAS FLAGRANT AND ILL-INTENTIONED.

Mr. Phelps rests on the argument set forth in the Appellant's Opening Brief.

## VI. MR. PHELPS WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

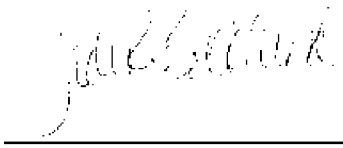
Mr. Phelps rests on the argument set forth in Appellant's Opening Brief.

## CONCLUSION

Mr. Phelps's convictions must be reversed, and the case remanded. Count two must be dismissed without prejudice.

Respectfully submitted on July 15, 2013,

**BACKLUND AND MISTRY**



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# CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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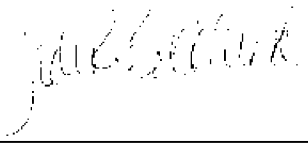

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